MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

RAPE-MURDER OF UNIVERSITY PROVOST IN 1986 IS BASIS FOR CIVIL SUIT BEFORE MICHIGAN SUPREME COURT IN ORAL ARGUMENTS THIS WEEK

LANSING, MI, December 11, 2006 – A 1986 slaying is the basis for a civil suit before the Michigan Supreme Court, which will hear oral arguments on whether the civil suit, which was not filed until 2002, is barred by the statute of limitations.

Trentadue v Buckler Automatic Lawn Sprinkler Company was brought by the estate of University of Michigan-Flint Provost Margarette F. Eby, who was found raped and nearly decapitated in her Flint home on November 9, 1986. Although her rape and murder remained unsolved for many years, in 2002 police arrested Jeffrey Gorton, who also raped and murdered Northwest Airline flight attendant Nancy Ludwig in 1991. Eby's estate sued Gorton and other defendants six months after his arrest, but the defendants seek to dismiss the suit, arguing that the suit was filed too late. The estate contends, and the Michigan Court of Appeals agreed, that its claims did not accrue until February 8, 2002, when the identity of Eby's killer became known.

Also before the Court are *People v Thompson* and *People v Wright*. In each case, the defendant was charged with maintaining a drug vehicle under MCL 333.7405(1)(d), which states that a person "shall not knowingly keep or maintain" a vehicle for the purpose of selling a controlled substance. In a 1999 decision, *People v Griffin*, the Michigan Court of Appeals ruled that, to establish a person's guilt under this statute, the prosecutor must show that the defendant "exercise[d] authority or control over the property for purposes of making it available for keeping or selling proscribed drugs and [did] so continuously for an appreciable period." In both *Wright* and *Thompson*, the Court of Appeals found that there was no evidence that either defendant was using his vehicle "continuously and for an appreciable period," as required by *Griffin*, to sell drugs. At issue is whether a single use or incident can satisfy the drug vehicle statute.

The remaining cases feature criminal, constitutional, consumer, contract, evidence, procedural, tax, and tort issues.

Court will be held on **December 12, 13, and 14**, starting at **9:30 a.m.** each day. The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice in Lansing.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The*

attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's web site at http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. *For further details about the cases, please contact the attorneys.*)

Tuesday, December 12
Morning Session

HARTMAN & EICHHORN BUILDING COMPANY, INC. v DAILEY, et al. (case no. 129733)
Attorney for third-party plaintiffs Steven Dailey and Janine Dailey: Charles J. Gerlach/(248) 406-5015
Attorney for third-party defendant Jeffry R. Hartman: Robert S. Rollinger/(248) 626-1133
Attorney for amicus curiae State Bar of Michigan Consumer Law Section Council, AARP, Michigan Consumer Federation, National Consumer Law Center, and Center for Civil Justice: Gary M. Victor/(734) 434-7278
Attorney for amicus curiae Michigan Association of Home Builders: Gregory L. McClelland/(517) 482-4890
Attorney for amicus curiae Michigan Association of Realtors: Gregory L. McClelland/(517) 482-4890
Trial court: Oakland County Circuit Court
LISS v LEWISTON-RICHARDS, INC., et al. (case no. 130064)
Attorneys for plaintiffs Arthur Y. Liss and Beverly Liss: Jay B. Schreier/(248) 647-9700, Dani K. Liblang/(248) 540-9270
Attorneys for defendants Lewiston-Richards, Inc., and Jason P. Lewiston: Brian G. Shannon, Michael F. Jacobson/(248) 351-3000
Attorney for amicus curiae State Bar of Michigan Consumer Law Section Council, AARP, Michigan Consumer Federation, National Consumer Law Center, and Center for Civil Justice: Gary M. Victor/(734) 434-7278
Attorney for amicus curiae Michigan Defense Trial Counsel: Mary Massaron Ross/(313) 983-4801
Trial court: Oakland County Circuit Court
At issue: The Michigan Consumer Protection Act (MCPA), which prohibits deceptive practices in trade or commerce, does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority," MCL 445.904(1)(a). Does the MCPA apply to residential builders or their corporate officers?
Background: These two cases involve the question whether a residential builder or its corporate officer can be sued under the Michigan Consumer Protection Act, MCL 445.901 et seq. (MCPA). The builders argue that the MCPA does not apply to them because that act exempts "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority," MCL 445.904(1)(a). Residential builders are subject to regulation by a board under the Occupational Code, MCL 339.101 et seq. In *Hartman & Eichhorn Building v Dailey*, the Court of Appeals ruled, in a published opinion, that builder Jeffry Hartman could be held individually liable both for tortious acts committed in the course of his employment and for violations of the MCPA. A majority of the three-judge panel said they were bound to follow a 2000 Court of Appeals decision, *Forton v Laszar*, 239 Mich App 711

(2000), which applied the MCPA to a residential builder. If not bound by *Forton*, the *Hartman* majority declared, it would have held that the Daileys could not sue Hartman under the MCPA. In the more recent case of *Liss v Lewiston-Richards, Inc.*, the trial court held, based on the *Hartman* decision, that the defendant residential builders could be held liable for violations of the MCPA. The Supreme Court granted Hartman's application for leave to appeal, and also granted the *Liss* defendants' application for leave to appeal, allowing them to bypass review in the Court of Appeals. The Court ordered that *Liss* and *Hartman & Eichhorn Building* be considered together.

PEOPLE v SMITH (case no. 130353)
Prosecuting attorney: Kathryn G. Barnes/(248) 858-0656
Attorney for defendant Bobby Lynell Smith: Michael J. McCarthy/(313) 535-1300
Trial court: Oakland County Circuit Court
At issue: Does *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), set forth the proper test to determine when "multiple punishments" are barred on double jeopardy grounds? Or should that issue be resolved through the analysis set forth in *People v Robideau*, 419 Mich 458 (1984)? Do defendant's convictions of armed robbery and felony-murder based on a predicate felony of larceny violate double jeopardy protections under either the *Blockburger* or *Robideau* test?
Background: Bobby Lynell Smith was charged in the shooting deaths of two men who worked at the tire store which Smith allegedly robbed. Smith was charged with two counts of felony-murder, with a predicate felony of larceny, and two counts of armed robbery. The two felony-murder counts charged Smith with murdering the tire store employees "while in the perpetration or attempted perpetration of a larceny." Smith was also charged with four counts of possession of a firearm during the commission of a felony (felony-firearm) and one count for each homicide and robbery charge. After a five-day jury trial, Smith was convicted of two counts of felony-murder, two counts of armed robbery, and four counts of felony-firearm. He was sentenced to life in prison without the possibility of parole for each of the murder convictions and to 17½ to 50 years in prison for each of the armed robbery convictions. Those sentences are to be served consecutive to four concurrent sentences of two years each for the felony-firearm convictions. Smith appealed, arguing that his convictions for both felony-murder and armed robbery amounted to "multiple punishments" in violation of his constitutional double-jeopardy protections. The Court of Appeals agreed, and vacated Smith's convictions for the underlying felonies of armed robbery. It also vacated two of Smith's convictions for felony-firearm, because Smith could only be convicted of one count of felony-firearm for each other felony that he committed. The prosecutor appeals.

TRENTADUE (ESTATE OF EBY) v BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY, et al. (case nos. 128579, 128623-5)
Attorneys for plaintiff Dayle Trentadue, as Personal Representative of the Estate of Margarette F. Eby, Deceased: Mark R. Granzotto/(248) 546-4649, David A. Binkley/(248) 457-7000
Attorney for defendants Buckler Automatic Lawn Sprinkler Company, Shirley Gorton and Laurence W. Gorton: Edward B. Davison/(810) 234-3633
Attorneys for defendant MFO Management Company: Noreen L. Slank, Deborah A. Hebert/(248) 355-4141

Attorneys for amicus curiae Channing Pollock, George Butler, Joseph Templet, William Grassel (Deceased), Kenneth Brown, Daniel McGrath and Other Similarly Situated Individuals Suffering From Asbestos-Related Disease: Michael B. Serling/(248) 647-6966, Margaret Holman-Jensen/(248) 443-6557, Angela J. Nicita/(313) 388-6966
Attorney for amicus curiae State Bar of Michigan Negligence Section: David R. Parker/(313) 875-8080
Attorney for amicus curiae clients of Goldberg, Persky and White, P.C.: Lane A. Clack/(989) 799-4848
Attorney for amicus curiae Michigan Electric and Gas Association: Michael J. Reynolds/(313) 965-9725
Attorney for amicus curiae Iron Workers Local No. 25 Pension Fund, et al.: Ronald S. Lederman/(248) 746-0700
Trial court: Genesee County Circuit Court
At issue: Margarette F. Eby was murdered in 1986, but her killer's identity wasn't discovered until 2002. Within six months of the killer's arrest, the plaintiff, the personal representative of Eby's estate, filed a civil suit for damages. The defendants argue that the lawsuit is untimely because it was filed after the statute of limitations expired. Did the plaintiff's claims accrue in 1986, or was their accrual delayed under the common law discovery rule because the plaintiff could not have known of the claims until the killer was identified, well after the limitation period expired?
Background: The plaintiff in this case is the personal representative of the estate of Margarette F. Eby, the Provost of the University of Michigan – Flint, who was raped and murdered in 1986 at a home she rented. The police collected evidence, including a fingerprint from an upstairs bathroom sink and DNA evidence from Eby's body, but the crime went unsolved for almost 16 years. In 2001, police reinitiated their investigation to find Eby's killer. On February 8, 2002, their investigation led them to Jeffrey Gorton, who was working for Buckler Automatic Lawn Sprinkler Company in November 1986 when he was sent to Eby's home to winterize the sprinkler system. The plaintiff alleges that Gorton returned two days later, perhaps through a door that he had earlier unlocked, to rape and murder Eby. Gorton pled no contest to first-degree murder and first-degree criminal sexual conduct; he was sentenced to life in prison. Within six months of Gorton's arrest, the plaintiff filed a wrongful death suit against a number of defendants, including Gorton, the sprinkler company, the rental property owner, the property management company, and others. Gorton's parents, who were his supervisors at the sprinkler company, were also sued. The defendants asked the trial court to dismiss the lawsuit, arguing in part that the claims against them accrued when Eby was murdered in 1986, and that the lawsuit was filed too late. The plaintiff responded that the claims did not accrue until February 8, 2002, when the killer's identity became known. The trial court dismissed one unsafe premises claim against two of the defendants, but denied the defendants' motion in all other respects. In a published opinion, the Court of Appeals reversed the trial court's dismissal of the unsafe premises claim and affirmed in all other respects. The Gortons appeal, as do the rental property management company and the sprinkler company.

Afternoon Session

PEOPLE v WRIGHT (case no. 130295)
Prosecuting attorney: Donald A. Kuebler/(810) 257-3854

Attorney for defendant Alphonzo Leon Wright: Patrick K. Ehlmann/(517) 324-9577
Trial court: Genesee County Circuit Court
PEOPLE v THOMPSON (case no. 130825)
Prosecuting attorney: Donald A. Kuebler/(810) 257-3854
Attorney for defendant Keith Demond Thompson: Patrick K. Ehlmann/(517) 324-9577
Trial court: Genesee County Circuit Court
At issue: Both defendants were charged with maintaining a drug vehicle under MCL 333.7405(1)(d), which states that a person "shall not knowingly keep or maintain" a vehicle for the purpose of selling a controlled substance. Does the statute require the vehicle to be used for such a purpose "continuously for an appreciable period" of time, as the Court of Appeals concluded in *People v Griffin*, 235 Mich App 27 (1999)? Must there be more than a single use of the vehicle for that purpose?
Background: MCL 333.7405(1)(d) states that a person "shall not knowingly keep or maintain a . . . vehicle . . . that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article." In 1999, the Court of Appeals ruled that, to establish a person's guilt under this statute, the prosecutor must show that the defendant "exercise[d] authority or control over the property for purposes of making it available for keeping or selling proscribed drugs and [did] so continuously for an appreciable period." *People v Griffin*, 235 Mich App 27 (1999). In the two cases here, the Court of Appeals held that the prosecutor failed to establish the defendant's guilt under MCL 333.7405(1)(d) as interpreted by *Griffin*. In *People v Thompson*, police received a tip that Keith Thompson would be selling drugs at a particular time and place. When the transaction was completed in Thompson's van, police officers closed in; after discovering cocaine in the suspected buyer's vehicle, the officers arrested Thompson. After a jury trial, Thompson was found guilty of delivery of less than 50 grams of cocaine and maintaining a drug vehicle. He was sentenced to serve two years' probation with the first 180 days in jail on both counts. Thompson appealed, and the Court of Appeals affirmed his delivery conviction in an unpublished opinion, but reversed his conviction for maintaining a drug vehicle, finding a lack of evidence to support that conviction. In *People v Wright*, Alphonzo Wright was arrested at the end of a police chase, when he abandoned his vehicle and tossed away a clear plastic bag that was determined to contain 125 grams of cocaine. The police also found a digital scale on the ground in front of Wright's car. A jury convicted Wright of possession with intent to deliver between 50 and 450 grams of cocaine and maintaining a drug vehicle. In an unpublished opinion, the Court of Appeals affirmed Wright's possession with intent to deliver conviction, but reversed his conviction for maintaining a drug vehicle, finding a lack of evidence to support that conviction. In both *Wright* and *Thompson*, the Court of Appeals found that there was no evidence that the defendant had a controlled substance in the vehicle for the illicit purposes prohibited by MCL 333.7405(1)(d), other than on the one occasion that led to the conviction. Accordingly, in both cases, the prosecutor failed to prove that the defendant was using his vehicle "continuously and for an appreciable period," as required by *Griffin*, the appellate court held. The prosecutor appeals.

PERRY v GOLLING CHRYSLER PLYMOUTH JEEP, INC. (case no. 129943)
Attorney for plaintiff Brian Perry: Scott R. Traver/(248) 673-1099
Attorney for defendant Golling Chrysler Plymouth Jeep, Inc.: Ronald S. Lederman/(248) 746-0700

Attorney for amicus curiae Detroit Auto Dealers Association: Robert Y. Weller, II/(313) 566-2500
Attorneys for amicus curiae Michigan Automobile Dealers Association: Raymond J. Foresman, Jr., Jason W. Johnson/(517) 351-6200
Trial court: Oakland County Circuit Court
At issue: The plaintiff was injured by a driver who had purchased a car that day from a dealership. Can the dealership be sued under the owner liability statute, or had it transferred title to the car buyer? MCL 257.933(9) provides that title transfers on the date of "execution of . . . the application for title." Is an application for title executed upon completion and signing by the applicant, or upon being placed in the mail to the Secretary of State by the dealership? And does the release of the driver of the car also release the owner of the car of liability?
Background: Ksenia Nichols struck Brian Perry with her newly-purchased Dodge Neon about six hours after she signed financing documents, made the down payment, and took possession of the car. The day before, Nichols had signed an application for title, as well as a statement of vehicle sale, odometer disclosure statement, and sales agreement. Golling Chrysler Plymouth Dealership, where Nichols bought the car, issued a 15-day registration to Nichols to serve as a temporary license plate. The dealership did not assign the title to Nichols until three days after the accident; eight days after the title was assigned to Nichols, the Secretary of State issued the new vehicle title in Nichols' name. The title shows that the finance company had filed its security interest the previous day. Perry, who suffered a closed head injury and irreversible brain damage in the accident, sued Nichols as the driver of the Neon, and those parties settled, with Nichols paying $85,000 and receiving in exchange a release from further liability. Perry also sued the dealership under MCL 257.401, the owner liability statute, claiming that the dealership was the owner of the Neon at the time of the accident. But the dealership moved to dismiss the case. MCL 257.933(9) states that title transfers on the date of "execution of . . . the application for title"; accordingly, the dealership argued, Nichols was the Neon's owner at the time of the accident. The trial court agreed and dismissed Perry's claim. The dealership had also requested dismissal of the lawsuit on the theory that Perry's release of Nichols from liability also released the dealership from any liability that it might have as the Neon's owner. The trial court denied the dealership's motion in that respect. In an unpublished per curiam opinion, the Court of Appeals reversed the trial court, finding that there was a genuine issue of material fact as to whether the dealership owned the vehicle at the time of the accident. The dealership appeals.

Wednesday, December 13
Morning Session

INTERNATIONAL HOME FOODS, INC. v DEPARTMENT OF TREASURY
LENOX, INC. v DEPARTMENT OF TREASURY (case nos. 130542, 130543)
Attorneys for plaintiff International Home Foods, Inc.: Patrick R. Van Tiflin, Daniel L. Stanley/(517) 377-0702
Attorneys for plaintiff Lenox, Inc.: Patrick R. Van Tiflin, Daniel L. Stanley/(517) 377-0702
Attorneys for defendant Department of Treasury: Ross H. Bishop, Mark A. Meyer/(517) 373-3203
Attorney for amicus curiae Council on State Taxation: Lynn A. Gandhi/(313) 496-7527
Trial court: Court of Claims
At issue: The Michigan Department of Treasury assessed the plaintiffs – both out-of-state

companies which employed Michigan residents in sales positions – for unpaid Single Business Tax (SBT). The plaintiffs argued that they were not subject to the SBT for the years at issue under the standards set forth in tax bulletins issued by the department. The department argued that the SBT was properly assessed, based on the nexus standard announced in *Magnetek Controls, Inc v Dep't of Treasury*, 221 Mich App 400 (1997). Can the *Magnetek* standard be applied retroactively to determine the plaintiffs' liability for the SBT for tax years 1989 through 1996?

Background: International Home Foods, Inc. manufactures and sells processed and prepackaged food products. During the tax years from 1989 through 1996, International Home Foods employed approximately 10 Michigan residents as salespersons. The company did not file or pay the Single Business Tax (SBT) for tax years 1989 through 1992, although it did file and pay the SBT for tax years 1993 through 1996. The Department of Treasury concluded that International Home Foods owed $529,396 of SBT for tax years 1989 through 1992; the department assessed that amount against International Home Foods, with an additional penalty of $264,698 plus statutory interest. The department also assessed a deficiency of $13,840 plus statutory interest for tax years 1993 through 1996. Lenox, Inc., is a manufacturer of fine china and related items. During the relevant tax years, Lenox had two employees in Michigan, a sales manager and an assistant. Both employees worked out of their homes and solicited orders, which were sent out of state for review and approval. Lenox did not file a SBT return for the year 1990; the department assessed $39,350 in SBT along with statutory interest. International Home Foods and Lenox separately appealed the department's assessments to the Court of Claims. The plaintiffs argued, in part, that they were not subject to the SBT for the years at issue under the standard set forth in tax bulletins that the department had issued, because their respective sales forces did not create a sufficient nexus with Michigan to trigger SBT liability. But the Court of Claims ruled in the department's favor, relying on the Court of Appeals decision in *Magnetek Controls, Inc v Dep't of Treasury*, 221 Mich App 400 (1997). In *Magnetek*, the Court of Appeals held that a SBT nexus could be established "by 'the conduct of economic activity in the taxing State performed by the vendor's personnel or on its behalf.' " The Court of Claims also held that the 1997 *Magnetek* decision could be applied retroactively to determine the plaintiffs' SBT liability for the tax years 1989 through 1996. International Homes Foods and Lenox filed separate appeals in the Court of Appeals, and the cases were consolidated for review. Relying on *In re D'Amico Estate*, 435 Mich 551 (1990), the Court of Appeals reversed the trial court in a published opinion, with one judge dissenting. The majority held that the Department of Treasury "may not retroactively apply a court decision favorable to [it] to a tax year before the release of that decision if [the department] had in place an interpretive ruling favorable to the taxpayer's position." The department appeals.

AZZAR, et al. v CITY OF GRAND RAPIDS, et al. (case no. 130310)

Attorney for plaintiff James D. Azzar: Gregory G. Timmer/(616) 235-3500

Attorneys for defendant City of Grand Rapids: Daniel A. Ophoff, Catherine M. Mish/(616) 456-4023

Attorney for amicus curiae Michigan Municipal League and Michigan Townships Association: Thomas M. Yeadon/(517) 351-0280

Trial court: Kent County Circuit Court

At issue: The city of Grand Rapids prosecuted a property owner for violations of the Grand Rapids Building Maintenance Code. After the owner was acquitted of the charges, he sued the

city, asserting that it had no authority to promulgate or enforce the code. Is the city building code preempted by the Single State Construction Act, MCL 125.1501 *et seq*.?

Background: James D. Azzar purchased a historic fire station from the city of Grand Rapids in an October 1997 auction. The building needed significant repairs, but because the fire station was a designated historic landmark, the Grand Rapids Historic Preservation Commission had to approve repairs in advance. While Azzar sought approval of a specific repair to the station's exterior, the city charged him with a misdemeanor, claiming that the building's exterior surfaces were out of compliance with the Grand Rapids Building Maintenance Code. Azzar ultimately obtained approval for the repair and the city dismissed its complaint. The city later filed two additional complaints against Azzar, charging him with similar misdemeanor violations of the code, but neither of those complaints resulted in convictions. Azzar then sued the city under a federal statute, 42 USC 1983. Azzar claimed that the city was, through the building code, depriving him of his legal rights. He argued in part that the city had no authority to promulgate or enforce the code, because the code was preempted by the Single State Construction Act, MCL 125.1501. But the trial court ruled that state law did not preempt the code; the court granted the city's motion to dismiss Azzar's complaint. The Court of Appeals affirmed in an unpublished opinion, ruling that the Single State Construction Act does not expressly preempt local maintenance codes like that enacted by the city. The Court of Appeals also found that the Single State Construction Act does not completely occupy the field of property maintenance regulations, that its regulatory scheme is not so pervasive as to support a finding of total preemption, and that the regulated subject matter did not demand exclusive state control. Azzar appeals.

CZYMBOR'S TIMBER, INC., et al. v CITY OF SAGINAW, et al. (case no. 130672)

Attorneys for plaintiffs Czymbor's Timber, Inc., and Michael Czymbor: John J. Bursch, Joseph M. Infante/(616) 752-2474

Attorney for defendant City of Saginaw: Scott C. Strattard/(989) 498-2100

Attorney for amicus curiae Michigan Department of Natural Resources: Sara R. Gosman/(517) 373-7540

Attorney for amicus curiae Michigan United Conservation Clubs: Marc D. Matlock/(517) 706-0000

Attorney for amicus curiae Michigan Municipal League: Michael P. McGee/(313) 963-6420

Trial court: Saginaw County Circuit Court

At issue: Two Saginaw city ordinances prohibit discharging weapons within city limits, which prevents the plaintiffs from hunting on their property. Are these ordinances preempted by the state hunting control act – which provides the Department of Natural Resources with the exclusive authority to regulate hunting – or by other state statutes that regulate hunting?

Background: This case concerns the validity of two ordinances enacted by the city of Saginaw. The first city ordinance, § 130.02, provides that "No person shall discharge or propel any arrow, metal ball, pellet, or other projectile by use of any bow, long bow, cross bow, slingshot, or similar device within the City limits." The second city ordinance, § 130.03(D), states in part that "It shall be unlawful for any person to discharge a firearm in the City." Czymbor's Timber Company, Inc. owns a 56-acre parcel of property within the city limits; its agent Michael Czymbor, and other members of his family, wish to hunt on the property. The plaintiffs sued; they argued that the ordinances conflict with the state's regulation of hunting through the Department of Natural Resources. But the trial court denied the plaintiffs' request for an order to

stop the city from enforcing the ordinances, and later dismissed the case on the city's motion. The Court of Appeals affirmed the trial court's ruling in a published opinion. The plaintiffs appeal.

Afternoon Session

TRI-COUNTY INTERNATIONAL TRUCKS, INC., et al. v HILLS' PET NUTRITION, INC. (case no. 130671)
Attorney for plaintiffs Tri-County International Trucks, Inc., and Idealease of Flint: John R. Monnich/(248) 548-4747
Attorney for defendant Hills' Pet Nutrition, Inc.: Noreen L. Slank/(248) 355-4141
Trial court: Lenawee County Circuit Court
At issue: The plaintiffs settled a personal injury lawsuit and filed this declaratory judgment action, alleging that the defendant is contractually obligated to indemnify them for the amount they paid in settlement. Does the defendant have a duty to indemnify plaintiff Tri-County International Trucks, Inc.?
Background: In 1992, Idealease Services, Inc. entered into a lease and service agreement with Hills' Pet Nutrition. According to the agreement, Idealease Services (or one of its affiliates) would lease trucks to Hills' Pet Nutrition and provide maintenance for those trucks on a nationwide basis. In 2001, Brian Head, a Hills' employee, was injured while driving a truck owned by Idealease of Flint and maintained by Tri-County International Trucks, Inc. Head and his wife sued Idealease of Flint and Tri-County, alleging that the defendants were liable for defects in the truck that caused the accident. That lawsuit was settled for $2.3 million. One issue in this case is who is responsible for paying the settlement amount. Idealease of Flint and Tri-County filed a separate suit against Hills', contending that Hills' was required to indemnify them against Head's claims. Both sides filed motions for summary disposition. The trial court denied the plaintiffs' motion, but ruled that Hills' was not obligated to indemnify the plaintiffs. In an unpublished opinion, the Court of Appeals reversed, holding that Hills' was required to indemnify both Tri-County and Idealease of Flint. One judge dissented in part, concluding Hills' had no duty to indemnify Tri-County. Hills' appeals. The Supreme Court has ordered oral argument on the application, directing the parties to address whether Tri-County is entitled to indemnification.

LAWSON v KREATIVE CHILD CARE CENTER, INC. (case no. 130872)
Attorney for plaintiff Deserai Lawson, Next Friend of Zhimon Bingham, a Minor: Stephanie L. Arndt/(248) 552-8500
Attorney for defendant Kreative Child Care Center, Inc.: Ronald S. Lederman/(248) 746-0700
Trial court: Wayne County Circuit Court
At issue: A child told his mother that his "butt hurt" and that "Uncle Fred[die] check out my butt." The mother repeated this statement to her child's treating physicians, who documented it in the medical record. Is the child's statement admissible in this civil action under the hearsay exception for statements made for medical treatment?
Background: Deserai Lawson sued Kreative Child Care Center, alleging that it improperly released her two-year-old son, Zhimon Bingham, to his uncle Freddie Marks, who then molested the child. Lawson claims that Zhimon told her that his "butt hurt" and that "Uncle Fred[die]

check out my butt." Lawson took Zhimon to the hospital where she, not Zhimon, repeated these statements to Zhimon's treating physicians; the statements are noted in the medical record. Kreative Child Care asked the trial court to dismiss Lawson's complaint, arguing that Lawson could not present any admissible evidence to establish that Marks was the person who molested Zhimon. In response, Lawson argued that Zhimon's identification of Marks, as set forth in the medical record, is admissible into evidence as a statement made for the purposes of medical treatment under Michigan Rule of Evidence (MRE) 803(4). The trial court disagreed and granted Kreative Child Care's motion for summary disposition. The Court of Appeals reversed in an unpublished opinion, concluding that the statement Lawson made to Zhimon's healthcare providers was admissible in its entirety under MRE 803(4). Kreative Child Care appeals.

Thursday, December 14
Morning Session Only

MILLER v CHAPMAN CONTRACTING, et al. (case no. 130808)
Attorney for plaintiff Buddy D. Miller, II: Jason J. Liss/(248) 865-2900
Attorney for defendants Chapman Contracting, Ramzy Kizy, Jr., Kevin R. Paperd, and Sweepmaster, Inc: Michael L. Updike/(248) 851-9500
Trial court: Oakland County Circuit Court
At issue: The plaintiff's attorney erroneously named the plaintiff, instead of his bankruptcy trustee, as the plaintiff in this lawsuit. After the statute of limitations expired, the defendants moved to dismiss the case, pointing out the plaintiff's failure to name his bankruptcy trustee in the lawsuit. The plaintiff filed a motion to amend the complaint to substitute the bankruptcy trustee as plaintiff, but the trial court dismissed the lawsuit. The Court of Appeals affirmed. Should the trial court have granted the request to amend the complaint?
Background: Buddy D. Miller, II was injured when, on December 28, 2000, he was struck by a vehicle driven by Kevin R. Paperd and allegedly owned by Chapman Contracting, Ramzy Kizy, Jr., or Sweepmaster, Inc. On March 6, 2002, Miller filed a chapter 7 bankruptcy petition; Wendy Turner Lewis was appointed trustee of Miller's bankruptcy estate. Lewis hired a lawyer and asked him to file a personal injury lawsuit based on the auto accident. The October 22, 2002 complaint, which was filed before the expiration of the statute of limitations, listed Miller personally as the plaintiff rather than the bankruptcy trustee. After the statute of limitations expired, Paperd and the other defendants moved to dismiss the case. They argued that the bankruptcy trustee was the proper plaintiff, and that Miller had no standing to pursue his action against them. Miller filed a motion under Michigan Court Rule (MCR) 2.118(D), asking the trial court allow the bankruptcy trustee to amend the complaint to correct the mistake in the pleadings, and to properly reflect her identity as the plaintiff. The trial court denied the plaintiff's motion for leave to amend as futile and dismissed the lawsuit. The trial court reasoned that Miller's request was not merely to correct a mistake in the pleadings, but was actually a request to add a new party, and that the expired statute of limitations barred the plaintiff from adding a new party to the lawsuit. The Court of Appeals affirmed the trial court's ruling in an unpublished opinion. Miller appeals.

HOSEY v BERRY (case no. 131213)
Attorney for plaintiff Amelia Hosey: Joseph H. Howitt/(248) 350-3700
Attorney for defendant Chantay Starghill Berry: Ronald S. Lederman/(248) 746-0700

Attorney for amicus curiae Michigan Defense Trial Counsel: Mary Massaron Ross/(313) 983-4801
Attorney for amicus curiae Michigan Trial Lawyers Association: Thomas A. Biscup/(586) 566-7266
Trial court: Oakland County Circuit Court
At issue: The plaintiff seeks non-economic damages for injuries that she claims to have received in an automobile accident. The defendant filed a motion for summary disposition, arguing that the plaintiff did not suffer a serious impairment of a body function, as defined in MCL 500.3135(1), and was not entitled to damages. The plaintiff responded to the defendant's motion by submitting reports containing unsworn opinions from doctors. Does Michigan Court Rule (MCR) 2.116(G)(6) permit a trial court, in deciding a motion for summary disposition, to consider unsworn statements or opinions of potential witnesses contained in documents that may be inadmissible at trial?
Background: Amelia Hosey sued Chantay Starghill Berry over an October 7, 2000, automobile accident, in which Berry allegedly disregarded a stop sign and struck Hosey's vehicle. Hosey alleges that, as a result of the accident, she seriously injured her back and neck. At the conclusion of discovery, Berry moved for summary disposition under Michigan Court Rule (MCR) 2.11(C)(10); she argued that Hosey did not meet the requirements for non-economic damages set by MCL 500.3135. That statute provides that a person injured in an auto accident can recover non-economic damages "only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement" as a result of the accident. Hosey had failed to demonstrate that she suffered a serious impairment of an important body function and thus was not entitled to recover non-economic damages, Berry contended. Berry supported her motion with medical records from Hosey's treating physicians. In response, Hosey provided the court with three "physician's reports" that were signed by physicians, although not under oath. These reports offered the physicians' opinions that Hosey suffered serious injuries as a result of the accident and was disabled from performing many of the ordinary activities of daily living. To withstand a motion under MCR 2.116(C)(10), "affidavits, depositions, admissions, and documentary evidence . . . shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." The trial court dismissed Hosey's lawsuit, finding that the physician reports were not admissible and hence were insufficient to establish that Hosey had been seriously injured. The Court of Appeals reversed in an unpublished opinion. The appellate court held that, although the reports themselves were inadmissible, the doctors' opinions expressed in the reports would be admissible in the form of opinion testimony at trial. The Court of Appeals remanded the case to the trial court to consider whether Hosey suffered a serious impairment of body function. Berry appeals.

KNUE v SMITH (case no. 130377)
Attorney for plaintiffs Daniel Knue and Jacqueline Knue: Paul A. Ledford/(616) 846-8860
Attorney for defendants Joan Smith, Steve Smith, and Cornelius Casey Smith, a/k/a Casey Smith: Steven F. Stapleton /(616) 459-1171
Trial court: Ottawa County Circuit Court
At issue: Does the fee-shifting provision of the offer-of-judgment rule, Michigan Court Rule (MCR) 2.405(D), apply to equitable claims to quiet title? Was the offer of judgment in this case unconditional as required by MCR 2.405(A)(1), when it included a demand for a quitclaim deed?

Background: In this quiet title action, disputing neighbors claimed possession of a sliver of waterfront land. Daniel and Jacqueline Knue sued Joan, Steve, and Cornelius Smith; the Knues argued they had acquired the land by adverse possession. The trial court ruled in favor of the Knues, who then sought to recover costs and attorney fees under the offer-of-judgment rule, Michigan Court Rule (MCR) 2.405. That rule provides for an award of costs if a party rejects another party's "offer" to "stipulate to the entry of judgment in a sum certain" and if the verdict at the conclusion of the proceedings is less favorable to the rejecting party than the offer. The Knues made a written offer "for stipulation of entry of judgment," agreeing to pay $3,000 in return for a transfer of the disputed waterfront land by quitclaim deed. The Knues proposed that the parties would then dismissal all claims "with prejudice and without costs." The Smiths acknowledged the offer, but objected to the Knues' characterization of it as an offer of judgment. The Smiths argued that MCR 2.405 does not apply to a case like this one, where the parties seek only equitable remedies, such as entry of a judgment quieting title to land. The Smiths did not accept the offer, and the parties proceeded to trial. After the lawsuit was resolved in their favor, the Knues filed a motion under MCR 2.405(D)(1), requesting actual costs in the amount of $2,527.75 and attorney fees of $21,707.00, on the grounds that they had made an offer for stipulation of entry of judgment that the Smiths rejected, and that the verdict at the conclusion of the proceedings was more favorable to the Knues than the offer. The trial court granted the motion; the Court of Appeals affirmed in a published opinion. The Smiths appeal.

LANZO CONSTRUCTION COMPANY v WAYNE STEEL ERECTORS (case no. 130992)

Attorney for plaintiff Lanzo Construction Company: Noreen L. Slank/(248) 355-4141
Attorney for defendant Wayne Steel Erectors: Michael F. Schmidt/(248) 649-7800
Trial court: Wayne County Circuit Court
At issue: The defendant agreed to indemnify the plaintiff for any liability for claims arising from a construction project. MCL 691.991 states that such an agreement cannot be enforced if it amounts to a promise to indemnify the promissee (here, the plaintiff) for injuries caused by the promissee's sole negligence. The defendant's employee sued the plaintiff, alleging that he tripped on debris at the construction site. Is the defendant obligated to indemnify the plaintiff for the employee's claim, or was the plaintiff's sole negligence the cause of the employee's injury?
Background: Fernando Agueros, an employee of Wayne Steel Erectors, was injured when he fell while carrying a bundle of rerod bars during the construction of the Leib Screening and Disinfection Facility for the city of Detroit. Agueros sued Lanzo Construction Company, the general contractor for the project; Agueros claimed that he tripped and fell over debris that Lanzo or its subcontractors had negligently failed to remove from the area. Agueros testified in his deposition that debris on the work site forced him to take a route through the construction site he would not have otherwise taken, and that he may not have had his accident but for this forced re-routing. However, he admitted that he miscalculated the distance to a column when he turned around while carrying eight- to ten-foot long rerod bars on his shoulder, and that the rerod struck the column. Agueros testified that he wasn't expecting the impact, and that he lost his balance and fell. Lanzo asked Wayne Steel to defend against Agueros's lawsuit, citing Wayne Steel's agreement to indemnify Lanzo from any liability for claims filed against Lanzo in connection with the construction project. Wayne Steel refused, arguing that there was no evidence that anyone other than Lanzo was responsible for Agueros's injury. Accordingly, Wayne Steel was not obligated to indemnify Lanzo under MCL 691.991, Wayne Steel contended. MCL 691.991

makes unenforceable indemnity agreements that purport to indemnify the promissee – in this case, Lanzo – for injuries caused by the promissee's sole negligence. Lanzo disagreed with Wayne Steel's assessment of the evidence, arguing that Agueros had admitted that he was partially responsible for the accident. Lanzo then settled its lawsuit with Agueros for $125,000 and sued Wayne Steel, seeking to recover the amount that it paid to Agueros to settle his lawsuit. Lanzo and Wayne Steel filed cross-motions for summary disposition, asking the trial court to determine whether the indemnity provision was unenforceable under MCL 691.991. The trial court ruled that it was unenforceable, and granted Wayne Steel's motion for summary disposition. The Court of Appeals affirmed in an unpublished opinion. Lanzo appeals.

BANKS v EXXON MOBIL CORPORATION, et al. (case no. 131036)
Attorney for plaintiff Michael Banks: Mark R. Granzotto/(248) 546-4649
Attorney for defendants Exxon Mobil Corporation, d/b/a Wixom Mobil on the Run, and Robert Pemberton: Kelley M. Haladyna/(313) 223-3500
Trial court: Oakland County Circuit Court
At issue: Did the owner of a gas station and its manager know, or should they have known, of the dangerous condition of a damaged gasoline pump, so that they should be held liable for the injuries suffered by a customer who attempted to use the pump? The trial court's ruled that the jury would be instructed that it could infer that a missing surveillance videotape would be adverse to the gas station owner and its manager. Should this ruling play any role in determining whether summary disposition is warranted under Michigan Court Rule (MCR) 2.116(C)(10)?
Background: Michael Banks stopped for gasoline at an Exxon Mobil service station in Wixom. A damaged pump sprayed gasoline onto Banks' face. Banks reported the incident to assistant manager Debra Salsbury, who went with Banks to inspect the pump; it appeared to Salsbury that a customer had run into the pump with a vehicle. Salsbury reported the incident to Exxon Mobil, which instructed her to provide it with the videotape from the station's surveillance camera. Before giving Exxon the videotape, Salsbury watched it and later testified that it did not show how the pump became damaged or Banks' injury. Banks sued Exxon Mobil, Salsbury and station manager Robert Pemberton. Banks asked the defendants for a copy of the videotape, but was told that the defendants could not find it. The trial court ruled that, if the defendants failed to provide Banks with a copy of the videotape by a certain date, the jury would be instructed that it could infer that the videotape would be adverse to the defendants. The defendants were unable to produce the videotape. They moved to dismiss the case, arguing that there was no evidence that they had sufficient prior notice of the pump's defective condition. The trial court granted the defendants' motion, and the Court of Appeals affirmed in an unpublished opinion. Banks appeals.

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